CIA Covert Action and International Law

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by Richard A. Falk

In one respect, international law has always been relevant to the conduct of illegal covert activities in foreign societies. The "guilty" government will not question the sovereign prerogatives of the target society to take appropriate punitive measures to apprehend and punish the perpetrators. The U-2 incident illustrates this relevance vividly. After the U-2 was shot down and Francis Gary Powers captured on May 1, 1960, the United States, not realizing that Powers survived the crash, issued a cover story about a weather plane having accidently strayed from course. When the Soviet Premier Nikita Khrushchev blew the cover story, catching the whole government from Eisenhower on down in a humiliating lie, the United States finally acknowledged that the U-2 was on a spy flight, that Powers was a Central Intelligence Agency (CIA) contract employe, and that the Soviet government was entitled to apprehend and punish Powers as well as make an international protest about the violation of its sovereign air space. By the middle of May, Eisenhower promised the Soviet leader that U-2 flights over the Soviet Union had been permanently suspended. Implicit in the American response was the illegal status of the U-2 flights and their consequent impropriety. Perhaps, more to the point, was the residual willingness to comply with international law if and only if the CIA link is discerned by irrefutable evidence and the cover story blown. But as long as the secret is kept or the cover story holds, the inhibitions of international law are cast aside.

Perhaps, additional qualifications are necessary. The Soviet Union displayed the capacity to shoot the U-2 down and, therefore, the flights would have become operationally untenable in any event. More remote, less territorial, espionage satellites were about to be made operational. Finally, the Soviet Union had geopolitical clout; U-2 overflights of other adversaries such as Cuba and North Vietnam, countries without shootdown capabilities or geopolitical clout, continued even though their existence was discovered by the target society governments and angry protests formally made. Therefore, the residual relevance of international law is a matter of last resort and of modest importance.

It is surprising that the international law argument against covert activities is so rarely raised. Even critics of the impact of secrecy upon United States foreign policy have not argued that the CIA should be curtailed because its activities are flagrantly in violation of international law. Rather, the argument for curtailment rests exclusively upon domestic constitutional considerations of accountability and of the associated claim that democratic traditions erode because public officials are encouraged to deceive and lie to their own citizenry to maintain "the cover."

There is not much doubt that several standard types of CIA covert operations violate international law standards to which the United States government is formally committed. If such violations were committed by rival governments, they would be denounced by our officials as "illegal." Perhaps the illegality of secret operations is not noticed because there is no reason to expect governments to be responsive to international law when they are not even held accountable to domestic legal processes.

Undoubtedly, one reason for the neglect of the international law dimension is that when more carefully documented disclosures made their way into the public arena, most of those with access to the relevant patterns of conduct were policymakers. Policymakers, liberal or conservative, base their evaluations of foreign policy initiatives on domestic arguments and on their degree of success, rather than on their degree of conformity to moral or legal norms. The Bay of Pigs operation in 1961 was regarded as a fiasco not because the United States had participated covertly in an aggression against a foreign government with whom we were at peace, but because the CIA sponsored an invasion by anti-Castro exiles that failed so miserably in its strategic mission.

An explanation closer to the truth is that CIA enthusiasts who do not doubt that covert operations may occasionally be "illegal" or involve "immoral" practices accept their occurrence as essential to the furtherance of national purpose in the world or to offset similar initiatives by America's geopolitical rivals. In effect, the pro-CIA position holds that covert operations are more important for the country's well-being than complying with international law.

The International Law Case

The international law case is, in a sense, self-evident and is partially conceded by the CIA's insistence upon secrecy and the related practice of defending itself against allegations by cover stories (i.e., lies). The secrecy/deception pattern arises in part because the behavior is inherently objectionable to a segment of domestic and, even more so, world public opinion. There is also an implicit awareness that CIA covert activities in foreign societies violate their fundamental international law rights as sovereign states. Surely, the United States government claims the legal right to insulate American society against covert activities carried out under the direction of a foreign government, especially if such activity were to cross the line of intelligence gathering and involve attempted interference and manipulation of domestic political processes.

International law rests on the fundamental proposition that the government of every sovereign state has complete jurisdiction over events taking place within its territory and that, correspondingly, a foreign government has no legal right to act beyond such explicit grants of right as are made in the course of exchanging diplomatic representatives or agreeing to a foreign military presence. In a wide array of contexts, CIA covert activities occur with the consent of foreign governments and are designed to sustain such a government in power against its domestic enemies. In such a situation, the secrecy and cover story are maintained not to avoid a U-2 kind of confrontation, but to protect the effectiveness of the operation on behalf of the foreign government.

The international law issue is a special instance of the broader question as to whether a foreign government can legitimate intervention in its internal affairs by giving its consent. No clear guidelines are available in this situation. If there is an ongoing civil war, then some international lawyers consider foreign governmental intervention on behalf of either side, even if requested, illegal. More broadly, the argument is made that any secret authorization of foreign military and para-military action violates the principle of national self-determination that inheres in a state (or society) rather than in its government. Finally, if the covert activities to which consent has been given are aspects of conduct that violates international law, then the CIA is an accessory to the illegal behavior of the foreign government. For example, if the CIA, at the request of the government in state A, helps recruit and finance an army for an attack on state B, the entire operation is illegal under international law and the United States and the government of state A are the guilty parties.

Another more esoteric situation is created if the CIA, at the request of the government in state A, helps with commission of "crimes against humanity" (a Nuremberg category of offense) by providing weaponry or counseling tactics that involve indiscriminate and inhumane destruction of civilians, even if the victims are citizens of the country wherein the action occurs. Such a situation existed for more than a decade on a massive scale with the so-called "secret war" in Laos.

trum of covert activities carried on without the consent of the constituted government in the foreign society or in direct opposition to its wishes. The spectrum ranges from intelligence gathering to participation in a coup to seize political power from the present government. In the middle are efforts to influence the outcome of elections in a foreign society, such as "the green light" reportedly given on September 23, 1970, by the Nixon Administration "to do all possible—short of a Dominican Republic-type action—to keep Allende from taking power" in Chile. Bizarre cross-purposes are occasionally manifest, as when the CIA took some part in overthrowing the Diem regime in South Vietnam during 1963 even though the Saigon government was a United States ally whose existence was stabilized by earlier CIA interventions. The United States government concluded that it had to destroy the Saigon regime in order to save it. This clearly violated nonintervention norms and prohibitions upon the use of force to engage in military or para-military activities in a foreign society for purposes hostile to the constituted government. Published reliable sources make it plain that such a military and para-military role has been played by the CIA in many countries since the formation of the Agency in 1947, especially since the Korean War allowed the Cold War mentality to dominate foreign policy goals.

One extreme instance of such a CIA undertaking was the authorization of a para-military operation under the direction of Colonel Edward Lansdale to disrupt the public order of North Vietnam in 1954 during the aftermath of the Geneva Accords. The intervention was aggravated by the effort to disrupt an international peace agreement (negotiated after

seven years of bloody warfare) to which the United States had given its solemn pledge.

Among other significant examples of para-military intervention by the CIA to overthrow a legal government in a foreign society are the following: the anti-Mossadegh coup of 1953 in Iran; the anti-Arbenz coup of 1954 in Guatemala; the unsuccessful anti-Sukarno coup of 1958 in Indonesia; the unsuccessful anti-Castro invasion of Cuba at the Bay of Pigs in 1961; the unsuccessful harassment of Chinese administration of Tibet throughout the 1960s; the anti-Papandreou coup of 1967 in Greece; and the anti-Sihanouk coup of 1970 in Cambodia. These are the most publicized instances, but there are growing indications that CIA covert activities occurred in additional countries where the United States was eager to encourage a change of government policy and personnel, perhaps less dramatic than a coup, but a substantial interference with the "political independence" of a sovereign state.

Kindred Party System

Andreas Papandreou, the son of the Greek liberal leader George Papandreou, was asked by Laughlin Campbell, the head of the CIA in Greece in 1961, to persuade his father to accept a constitutional innovation called "the kindred party system" designed to keep a conservative premier, Constantinos Caramanlis, in power. When Andreas told him that his father was "not about to commit political suicide to please you," Campbell turned from affability to anger. According to Andreas Papandreou, Campbell said: "Go tell your father that in Greece we get our way. We can do what we want—and we stop at nothing."

This statement summarized the ethos of the CIA and made a mockery of the contemporaneous public diplomacy of John F. Kennedy and his ideological lieutenants who wrote and spoke so glowingly of their commitment to democratic government and their acceptance of pluralism and the dynamics of national self-determination. The CIA revealed a commitment to a very different kind of world order, and an endorsement of policies designed to deny other countries political independence. This violated the United Nations Charter, Article 2(4), which, as a duly ratified treaty, is part of "the supreme law of the land" by the United States Constitution.

International Law of Human Rights

One of the major areas of development for international law over the past three decades has been the promotion of an international law of human rights. The general aspiration is proclaimed in Articles 55 and 56 of the United Nations Charter, and has been given more specific content in the Universal Declaration of Human Rights. The norms in these documents, supported by an overwhelming consensus of governments including the United States, express a set of agreements regarding the limits of coercion a government may rely upon in relation to its own population. Although these legal documents cover a wide range of civil liberties associated with human dignity, the minimal legal commitment holds that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Individuals who stood in the way of CIA objectives have been deprived of their human rights. It is clear beyond doubt that in many countries, the CIA has opposed regimes that basically upheld human rights and helped replace them with regimes utilizing torture as a routine technique of governance such as in Guatemala, Greece and South Vietnam. The Chilean case is still in doubt as to detail, but the basic thrust of CIA efforts is clear: first, if possible, prevent Salvador Allende from coming to power through election; second, if the first line failed, encourage developments leading to the downfall of Allende as quickly and decisively as possible. Tragically, the latter was the outcome.

CIA covert activities actively contribute to the violation of international peace agreements.

The Chilean instance illustrates a general commitment of CIA policy to support right-wing governments that repress (no matter how mercilessly) human rights and to oppose progressive governments (no matter how respectful of human rights) through illegal forms of covert activity. The irony is that the CIA only succeeds in situations where the left-oriented regime has not moved in a totalitarian direction and, hence, allows political opposition to operate and mobilize its forces. Allende, for instance, was vulnerable to CIA tactics precisely because he upheld the human rights of his opposition.

The Law of War

A closely related issue concerns military conduct violative of the rules of war in the Hague and Geneva treaties which form the backbone of the law of war. According to Victor Marchetti and John Marks, authors of *The CIA and the Cult of Intelligence*, the Special Operations Division of the CIA carries out para-military and military roles without any deference to the laws of war. These laws are designed to protect "enemy" populations from cruel and indiscriminate modes of warfare. The United States and its World War II Allies relied upon violation of the laws in order to prosecute criminally thousands of Germans and Japanese soldiers and civilians thought to be responsible perpetrators. The trials led to convictions, prison sentences and some executions.

Obviously, the CIA is not the only bureaucracy responsible for violating the laws of war and responsible for war crimes, but it may be the only part of the government whose policies are consistently so designed. The status of the Nuremberg Principles is in some doubt among international lawyers, but the United States government took the lead in

trying to establish the war crimes experience after World War II as a permanent feature of international law. Therefore, CIA violations of international law involve various breaches of the laws of war and the commission of a wide array of offenses which would seem to qualify as crimes of war.

Other related undertakings by the CIA seem to have a distinct status under international law. There is evidence, for instance, that the CIA was active in relation to the Geneva Accords of 1954 and 1962 and to the Paris Agreement of 1973 in obstructing implementation of a solemn international peace agreement. CIA efforts in Laos immediately after the 1962 Geneva Agreements actually proceeded in defiance of White House policies to uphold the bargain so painfully negotiated. The post-1973 role of the CIA in Indochina is difficult to depict in detail, but there is no doubt that the CIA has been active on a number of fronts to assure noncompliance with the Paris Agreements. Efforts to induce noncompliance with peace agreements go against the most fundamental legal thrust of the United Nations Charter "to save succeeding generations from the scourge of war." It is the type of activity that the Nuremberg Tribunal called the supreme crime against mankind. Thus, CIA covert activities actively contribute to the violation of international peace agreements to which the United States was either a negotiating, guaranteeing or endorsing party.

CIA supporters argue that constraints associated with international law would adversely affect America's national interests.

A separate kind of CIA violation of international law is reported by Marchetti and Marks. Evidently, Saipan in Micronesia has been used as a secret military base for CIA activities in Southeast Asia. Micronesia is a Strategic Trust Territory administered by the United States (supposedly for the well-being of the inhabitants) as a trust exercised for the organized international community embodied in the United Nations. The United States government is obligated to give annual reports of its administration and to allow periodic inspection visits by United Nations representatives. Naturally, the discovery of a CIA base on Micronesia would produce an international incident of major proportions. Hence, the CIA apparently disassembles the base prior to scheduled United Nations visits and then reassembles it as soon as they are over. Such behavior violates the Trusteeship Agreement upon which United States administration rests.

CIA supporters argue that constraints such as those associated with international law would adversely affect America's national interests if they were to be enforced against the CIA. Miles Copeland, a former CIA official, insists "that most intelligent citizens would be relieved, not dismayed" to know that the United States government is not shocked by the reality of "Soviet perfidy," and possesses the means, by way of American perfidy, to counter it. But this includes torture, murder, napalm, atrocities, deception and official lies.

Thomas W. Braden, another former CIA official, wrote an article in the *Saturday Evening Post* in 1967 provocatively entitled "I'm Glad the CIA Is 'Immoral'." Like Copeland, Braden argued that the United States is engaged in "a game of nations" in which the main players employ CIA-type activity in their search for relative advantages. After reviewing some of the CIA's more innocuous interferences in foreign societies—funding friendly unions, infiltrating student groups, financing anti-Communist cultural activity—Braden asks, "Was it 'immoral,' 'wrong,' 'disgraceful'? Only in the sense that war itself is immoral, wrong and disgraceful, for the Cold War was and is a war fought with ideas instead of bombs. And our country has had a clear-cut choice: Either we win the war or lose it." Of course, Braden poses the question in what appears to be a deliberately misleading way; it is one thing to counter Soviet politicizing and propagandizing with comparable means, but quite another to take part in para-military and military violence for a variety of purposes, many remote from any claim to be responding to covert interventions of geopolitical rivals of the United States. Nevertheless, an issue of genuine moment is posed: namely, other major governments active in international relations are not hobbled by restraints, i.e., do not respect international law. In such a situation, is it reasonable and desirable for the United States alone to be so hobbled? Why should the country penalize itself in playing the game of nations with unscrupulous rivals, particularly the Soviet Union?

To assess this argument adequately, it is necessary to determine the range, frequency and character of covert activities by other governments, as well as to appraise their degree of effectiveness. Soviet covert activities cover a range of illegalities comparable to those of the CIA in Asia and Latin America, but are limited to the area of Eastern Europe where CIA activities are least evident. Rather, the CIA seems most active in spheres of geopolitical influence where the United States seeks to acquire and to sustain its paramountcy. The role of these activities is more closely connected with neo-imperial diplomacy than with genuine insistence on neutralizing the activities of other governments.
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Nevertheless, the pro-CIA position is not entirely eroded. It is still possible to maintain that since other governments do not accept the restraints of international law, the United States is also not obliged to comply. In effect, the absence of enforcement procedures, the widespread practice of covert activities and the general quality of the state system mean that compliance with international law is a matter of voluntary determination by each government.

A related, more restrictive contention of the same general character is that the international legal norms of prohibition invoked in opposition to CIA covert activities are peculiarly

"weak" and "soft" instances of law, even with respect to international law as a whole. The principal norms at issue, such as the prohibition of aggression, the principle of national self-determination, the doctrine of nonintervention, crimes against the peace and crimes against humanity, are so general in character that it is difficult to achieve agreed definitions, much less agreed interpretation of their application to specific circumstances.

A government can make a legally coherent defense in most characteristic instances of CIA covert activities. It can be claimed that the government in a specific country gave its consent or requested assistance; that the action was undertaken to offset prior intervention by other foreign governments; that the particular battlefield practices were not as contended, were a departure from prescribed guidelines, were carried out without CIA knowledge and approval; or that the specific CIA operative acted beyond his proper province. Except for technical violations (i.e., tactics and weapons that violate the laws of war, use of Micronesia in violation of Trust Agreement) international law norms are not sufficiently precise to serve as more than commitments of good intention. In effect, CIA covert activity occurs in a virtual "no law" area, where the character of the norms is not of sufficient authority to fill the law vacuum created by notions of state sovereignty.

In a way, the argument is directed at the basic normative flaws in the world order system—namely, that there are still no legally significant qualifications on the discretion of a national government to the use of force in international conflicts, even when the force used amounts to initiation of warfare. Therefore, to complain about lesser included instances is hypocritical and nonsensical. The CIA's covert activities constitute, in general, a lesser included instance, perhaps rising on a few occasions to the status of a subspecies of war like the "secret war" on Laos or the role taken in repressing the insurgency in the eastern region of Peru during the mid-1960s.

Double Standards

A final line of argument concerns the "double standards" used to assess covert activities. CIA supporters often invoke "the legacy of OSS [Office of Strategic Services]" to argue that the CIA is engaged in the same sort of covert activities that were praised and glorified during World War II. By extension then, the CIA is alleged to be similarly carrying out missions to achieve the national purpose in a geopolitical period when outright warfare has been replaced, not by peace in a real sense, but by the intense and hostile competition labeled "Cold War."

Complicated questions arise from such an argument. It is necessary to determine whether the OSS really did the same things, from a legal point of view, as the CIA. Also, the argument that the justification of a state of war can be extended to various stages of international relations after World War II, including a condition of detente, must be assessed. Finally, it would be important to judge whether what the OSS did was compatible with international law standards.

Differences in national mood determine the moral and political climate in which CIA-type activities take place and generally shape public attitudes toward foreign policy. Such a climate, however, does not have any bearing on the legal status of behavior. Although this legal status is problematic, the foreign policy option to uphold the claims of international law exists, and has potential importance for the future of the country and for the quality of world order in general.

Rationale for Compliance

Despite serious objections to the international law position, the rationale for compliance is compelling. It rests on a series of separate grounds: law-abidingness as a civic virtue; the progressive general character of the international law rules at issue; and the relevance of international law to a system of world order based on peace and justice.

Implicit in domestic arguments against secret foreign operations is the impossibility of insulating a constitutional order at home from what is done abroad. At issue is a pattern of behavior, a way of dealing with the political process, a suspension of normal procedures of accountability. The same considerations apply to the rule of law. The Constitution holds international legal norms as "the supreme law of the land" if they are embodied in treaties; the Supreme Court has decided that customary rules of international law are also entitled to respect.

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It is neither possible nor desirable to separate foreign affairs from domestic society regarding the rule of law. The attitude of amorality and alegality so often characteristic of CIA operations abroad seeps into the actions of policymakers in domestic settings; the Nixon Administration's blatant behavior made this inevitable tendency plain. But as has been frequently observed, the lawlessness of Nixon's practices was paved by earlier patterns of conduct, one of which the covert activities of the CIA exemplifies. Respect for international law represents one element in a framework of accountability. Our leaders should accord respect to all categories of valid law. If international law is to be ignored as a constraint, then that policy decision should be made openly, on the basis of debate, and conceivably leading to a constitutional amendment of the supremacy clause. However, the status of international law as a necessary, if weak and uneven, system of behavior guidance is established so well that no government advocates its freedom to violate international law rules in general (although some refuse to be

bound by specific rules). Even the socialist governments have affirmed their respect for international law, have argued their own disputes by reference to rights established by international law (e.g., the Sino-Soviet territorial dispute) and couch their objections to behavior of other states by reference to international law criteria.

Part of securing the rule of law in general involves extending its reach to foreign policy. One motivation for the insistence on secrecy of some CIA operations is undoubtedly the degree to which these operations would strike the international community as "illegal," thus generating pressures for compliance. When these operations have been discovered by powerful adversaries and the cover story blown, as occurred in the U-2 incident, then the American governmental tendency has been to accept its obligation to comply with international law. Thus, no real claim is ever made by the United States government that a right to ignore international law exists, but only that certain secret operations should be carried out without normal scrutiny. Braden could easily have written a sequel to his article entitled "I'm Glad the CIA 'Violates' International Law."

Progressive Character of Norms

American foreign policy would benefit from an effective application of the norms at issue in covert activities. The doctrine of nonintervention and correlative principle of national self-determination encourage progressive social and political developments under most circumstances. The CIA's role has been to keep repressive governments in power and to overthrow or harass more progressive ones. Such a role is detrimental to international society. If the United States had complied with international law, there probably would be more progressive, socially responsible governments in power today throughout the Third World. Generally, the CIA has helped to promote the militarization of government wherever its influence has been strong.

The normal rationalization of the CIA role in foreign societies is that the United States must play a counter-interventionary role to offset Soviet and Chinese interventions. Much ambiguity surrounds this kind of claim—is it the appeal of Communist rhetoric, doctrine and domestic groupings that must be offset or is it foreign military assistance? Often, the energy for social revolution is primarily an indigenous matter which becomes "internationalized" after the CIA enters the scene. In any event, if the American role is genuinely counter-interventionary, then it can be carried out overtly and within the framework of international law. The doctrine of self-defense, the right of governments to receive aid and even the notion of counter-intervention, provides a sufficient basis for foreign policy initiatives designed to prevent "aggression" by geopolitical rivals. International law is not so conceived or so taut in its application as to jeopardize the well-being or security of a large state.

The basic point is that there is no persuasive reason for not eliminating illegal CIA covert activities. These activities have been generally reactionary in their social, economic and political impact upon countries desperately in need of social revolutions in order to overcome the misery of the general population. Hence, United States compliance with international law might aid in making the world safe for social revolutions in national societies now governed in an antiquated and repressive manner.

Quality of World Order

A final argument for compliance with international law relates to the entire quest for a peaceful and just system of world order. The argument must be made on two levels: how to prevent the breakdown of the existing relations and how to facilitate the emergence of a more acceptable form of world order than is provided by or possible under the state system.

First of all, the voluntary acceptance by principal governments of a minimal system of restraints on the use of force is closely connected with the capacity of the state system to maintain world peace over time; international law, although far from perfect, provides such a system, and it is one that enjoys widespread acceptance. The quality of that acceptance depends greatly on voluntary patterns of Great Power attitude and behavior. Since there are no international sanctions on principal governments other than public opinion and resistance by their rivals, voluntary compliance plays a central role. A country like the United States is especially important; its noncompliance influences the whole climate within international society and undermines any effort to take international law seriously as a restraint on others. Thus, one cost of United States noncompliance is to compromise national efforts to persuade other governments to comply or to mobilize opposition to illegal policies in the United Nations.

On a more dynamic level, the prospects for meeting the increasing world order crisis arising from population pressure, food shortages, spreading poverty, ecological decay and resource shortages depend on bringing more enlightened and progressive national elites to power. The authority structure of international law, although far from ideal, at least prohibits the sort of covert activities the CIA has engaged in over several decades. The elimination of these activities might encourage a more humanistic world climate that would bolster a social movement to reorganize and integrate life in "the global village." The open historical question is not whether "central guidance" or "global integration" will come about, but only how quickly, under whose control and by what elements of choice. The sooner we organize to achieve a new system of world order, the better the prospects for a nonviolent and non-traumatic adjustment. The CIA's global role is basically opposed to allowing such a transition and is aligned with the most narrow and destructive conception of the state system. Thus, there is a link between opposition to the illegal activities of the CIA and the growth of survival policies and politics in the world community; the demand for compliance with international law would strengthen that link.□